MILITARY CONTROL,

OR

COMMAND AND GOVERNMENT

OF THE

ARMY.

BY AN OFFICER OF THE LINE.

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PREFACE.

The following argument was prepared years ago, while the author was a member of the staff. It was the result of his own unbiassed reflections on our military system, which he saw to be working badly; many features of the army organization have since been altered, and many changes of the laws and regulations, have also occurred, but nothing has been done to reach what he conceives to be the radical defect of the system—indeed it has been growing continually worse, as would naturally be supposed, under a process of temporary expedients.

To discover the root of the defect, by looking beyond the laws to the Constitution, and beyond prevailing notions to the true nature of the army institution, was the motive that prompted the author's researches; and to develop that defect and propose the remedy, is his design in the publication of these remarks. It may be that, ere long, Congress getting tired of experiments in military legislation, may look attentively with its *own eyes* into the nature of the army institution, and seek to ascertain its true adjustment, under the Constitution; then these views may suggest a thorough reformation both in the organization of the army, and in the rules and regulations for its better government.

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SECTION I.

The difficulties in the army service on the subject of rank and command, or as it may preferably be denominated, military control, are numerous, and they are important, not only in relation to its harmony as a society, and its efficiency as an arm of national warfare; but yet more so, as being in fact the poisonous fruits of a vicious legislation, threatening the civil welfare of the country. They grow more numerous and important by reason of the delays which have taken place, of any competent decision of the principles to which they refer.

Were we to judge from the amount of fruitless controversy proceeding from this cause—from the yet unsettled opinions among our military men—from the apparent evasion on the part of the national legislature, of the questions involved—and from the peremptory decision of them, by the Executive, acting, from the necessity of the case, beyond its own legitimate sphere; we should regard the principles, on which the solution of these difficulties depends, as veiled in impenetrable darkness. The real cause is, however, as we have said, to be found in vicious legislation, and this has proceeded mainly from the pernicious practice so prevalent with us, in military matters, of copy-

ing foreign institutions and practices, without sufficiently reflecting on the differences between their political systems and our own. In the higher departments of military arrangement, accordingly, we are prone to regard the British as our examplar; in the minor, the French. Our present purpose leads only to the notice of the former: and we shall proceed to develop this cause of evil by first giving, in as brief terms as possible, such an account of the nature of these difficulties, in their connexion with existing doctrines of rank and command, as will serve to introduce the subject.

The Army of the United States, as known to the laws creating it, and to the Constitution, laws and regulations, establishing its organization and defining its duties, may be described as consisting of the President of the United States as "commander-in-chief," and the officers and privates under him, divided by organization into fixed legal bodies or corps. These are: first, the arms of service, as cavalry, artillery, and infantry, with their respective species; second, regiments of these species of arms; and, third, companies of these regiments. Each of these bodies, and, therefore—after adding what is called the general staff—the whole army, consists of line and staff; the former being the combatants of the army, the latter, assistants or aids of the commanders, in various ways, and providers and administrators of the means of life and of service. The staff at large, most of whom are vested with military titles, and the line, all of whose members must of necessity be so, consist each of commissioned and non-commissioned officers, inclusive of all the grades, from the President to the corporal.

The staff is divided into departments, and into

branches, the former consisting of corps of officers of the various grades of rank, whose functions are alike; the latter of corps of officers, whose grades of rank are, or may be, alike, but whose functions are various. It is in the former aspect we contemplate the staff when viewed abstractedly from the line. It consists of the following departments in our service: Adjutant General's, Inspector General's, Engineer's, Ordnance, Quartermaster's, Subsistence, Purchasing, Medical, Paymaster's. The names of these departments are, for the most part, indicative of the functions assigned to them; while the *staff* titles of the officers, denote their relative rank and authority in their respective departments, as, for example, in the department first named, there is, 1st. The Adjutant General, or chief of the department; then in order, 2d. Assistant Adjutant General; 3d. (say) Brigade Majors; 4th. Adjutants; 5th. Sergeant Majors; 6th. Orderly Sergeants.

When viewing the army at large, as composed of the legal corps before mentioned, these departments of the staff are mingled and divided on the other principle into branches, comprehending, more or less, the functions of the several departments; as, for examples, the general staff, division staff, brigade and regimental staff.

It would require a volume, as large as that in which this scheme of organization is attempted to be explained, reconciled, and enforced, to develop the almost numberless inconsistencies and extravagancies which flow from it, and to depict the paralyzing effect it must have on martial efficiency, and on the general purposes of good government of the army as a national institution. We shall, therefore, attempt no

more than a brief sketch of its operation on the former, leaving the rest to be inferred from this example, and from those true principles of organization, and of command and government, which we shall set forth and enforce in the sequel.

The second article of the Army Regulations, or Institutes, purports to prescribe and explain the "base of discipline," or rank and command, and the fundamental principle of this important subject of military service, is thus clearly expressed by its third paragraph: "It is the intention of the Government, that there be established in every regiment or corps, and throughout the army as one corps, a gradual and universal subordination or authority." More forcibly to express the singleness of principle, or unity of purpose, herein aimed at and promulgated, would be difficult. The propriety, the absolute necessity, of this fundamental rule of discipline, must be apparent to the slightest reflection; since, with a steady adherence to it, all must perceive the harmony of command and concert of action that would follow, and that without such adherence, confusion and discord would be inevitable.

The next paragraph sets forth the grades of army rank, exemplifying the order in which this principle is designed to operate, or exhibiting that range of subordination through which this universal authority is to be exercised in command. It is in these words:— "Under the President of the United States, as commander-in-chief, the following are the grades of army rank: 1, Major General; 2, Brigadier General; 3, Colonel; 4, Lieutenant Colonel; 5, Major; 6, Captain; 7, First Lieutenant; 8, Second Lieutenant; 9, Third Lieutenant; 10, Cornet or Ensign; 11, Cadet;

12, Sergeant; 13, Corporal; and the latter shall be superior to all private soldiers, including under that denomination, private musicians, artificers, and the like."

The student of these institutes, whom we will suppose to be a cadet at West Point, having read them so far, instantly feels himself on sure and plain ground; any preconceived mystery in military subordination, that he might have had, is thus swept clean from his mind, and he now feels confident, that whatever additional rules may obtain in the details of the service, there can be none to interfere with this; there can be nothing to obscure so luminous a principle; all must quadrate with it, and therefore obedience to his superior in rank, is at once the guide and the guarantee of his safe and honorable career. Judge then of his astonishment, when, in a step or two further, he comes to fourth, fifth, sixth, seventh, and eighth paragraphs, and finds so sudden a departure from, and dereliction of, a principle so clear, so satisfactory, so natural, and so necessary! What, exclaims he, are these? "Sergeant Majors! Quartermaster Sergeants! Drum Majors! Trumpet Majors! and what are these commissioned officers with assimilated and non-assimilated rank? What the general and non-commissioned staff with titles so different from those grades of army rank through which *all* authority was to pass? What new and inconsistent principles of command, checking, restricting, and limiting each other, are here prescribed? Are not these officers, or at least members, of the army? Is not the staff, whether general or non-commissioned, a part of it? What has become of the gradual and universal subordination or authority,

which was to obtain throughout the army, even as one corps?

The staff either is, or is not, a part of the army. If it be so, all these designations of rank belonging to it, he justly thinks, should have been comprised in the statement of grades given in paragraph fourth, so that all its parts should pass under the operation of the broad rule—the universal one, laid down in the third. If not a part of the army, but a sort of independent adjunct, then certainly, on the subject of rank and command, it must be independent of the authority prevailing through it; neither commanding nor being commanded.

To settle these unavoidable questions, he seeks to inform himself of the nature of the staff, and of course finds that its *functions* are indispensable to the existence of the army. They are its life-breath, in the department of orders; its character in the department of inspection; its food in the subsistence; its limbs in the quartermaster's; its health in the medical; its weapons in the ordnance; its reward in the pay; and its raiment in the purchasing department; yet strange contradiction he thinks it, that while it is also acknowledged to be a part of the army, it is not comprehended in that series of gradual and universal subordination, which was to obtain throughout the army, from the highest to the lowest member.

Prosecuting this enquiry, he refers to the rule of command among staff officers as laid down in the eighth paragraph. He there observes, that while, by paragraph sixth, officers of the staff with rank assimilated to lineal rank are "considered, in respect to rank, on the same footing, as if their rank were lineal," yet by

this, both classes are *restricted* in their command over officers of the staff having neither of these kinds of rank; that is to say, over those having what is called, with singular infelicity of phrase, unassimilated rank, within certain prescribed limits.

He sees in this a further exception to the universal rule of authority, and he thinks he sees in it, too, that while the latter are absolutely cut off, as most obviously they ought to be, from all command whatever over the former, the case is not an improbable one in service, when this rule, too, must be violated in favor of the lineal officer of inferior rank on whom the command may devolve; for, whether the chiefs of these unassimilated staff officers be present or absent, their command over their subordinates continuing, such subordinates become subject to two masters, which, it is said, from the highest of all authority, no man can serve. Their own staff chief's authority, or that of the military commander, one or the other, must prevail. These cases present, therefore, further and palpable contradictions of the principle of universal authority. The four remaining restrictions in this paragraph present as many classes of cases, of the same character.

More than ever impressed with the vital necessity of this universal principle of authority to the very existence of an army, he is willing to seek every information, or listen to any explanation, tending to reconcile these contrarieties of doctrine, and so turns to the forty-fourth article, purporting to give "the theory of the staff, and a summary of its duties."

He here finds it stated of staff officers, that as such they have no direct command over the troops; that they are only the organs, through which their respec-

tive commanders or chiefs communicate orders and instructions, either verbally or in writing; yet he finds grounds for the inference, that they have the right, indirectly, to command the troops through officers of military grades inferior to their own. Attending particularly to the phrase "as such," he thinks he perceives as the doctrine intended, (though a very exceptionable one,) that while as staff officers, that is, independently of their military rank, (which he supposes to be merged or suspended while acting in that capacity,) they are thus restrained in the article of command; yet in their capacity of officers with assimilated rank, they are, as before declared, "on the same footing" with lineal officers, and in this way are comprehended in the system of universal authority, and entitled, at their option, or at least when senior to all others present, to assume command.

But next he finds, paragraph 453, that the foregoing doctrines are applicable (whatever be really intended by them) only to "chiefs of staffs," and to their assistants, and also to aides de camp and adjutants; the officers of the administrative or disbursing departments not being within the contemplation of the article, notwithstanding its title, though many of these possess the same kind of rank. He next learns, to his utter confusion, that the chiefs of staffs are to form a chain of subordination "among themselves!"

A little reflection convinces him that these doctrines would put to hazard the most vital interests of the service, and that the indispensable principle of unity in military command, calls for the uniform military rank with which all who are indeed military officers should be invested, and the revival of the oft quoted fundamental rule obtaining throughout the army.

In short, deriving from the Institutes no instruction on the subject of his enquiries, he comes at last to the conclusion, from his own reflections, that the uncertainties and difficulties in it, proceed from this—that the two-fold connexion of the staff officers with this newfangled assimilated rank, is never sufficiently at any time, and sometimes not at all, adverted to, that even when spoken of in their staff capacity strictly, and as it were exclusively, yet the effect of the military title they bear, is such, as to cause an unwitting, or at least a forced, application to them of principles truly applicable to the lineal officers only; and again, from the same kind of inadvertence or force, an inversion of the practice takes place, that is, a distinction where, *consistently*, none should exist, is made; and we may as well add here, must, in the nature of things, be made, between lineal officers and officers of the staff holding this (so called) assimilated, but in reality, *brevet* rank; regarding the first as possessing command in the line, inclusive of the staff; while on the other hand, it regards such staff officers as, being merely such, possessing an empty, and worse than nugatory, military title, conferred without reason, and held accordingly without authority.

But these are not all the difficulties such supposed student would meet with in this view of the system. He finds on the statute book, to which these Institutes refer him, that this same brevet rank, though for other causes, is conferred on lineal officers also; and since it did not confer the right to command troops in the case of staff officers, either directly or indirectly, though they are declared to be "on the same footing as if their rank were lineal," he becomes solicitous to

learn how it will operate in the persons of lineal officers themselves, and is thence led into that labyrinth of disputation to which the conflicting claims of its possessors have given rise. Leaving him, however, to explore his mazy way alone, his original guide and light having deserted him, we shall close this part of our task by a few obvious reflections.

So far, these difficulties are clearly owing to a departure from that fundamental rule of authority and subordination, deliberately and forcibly laid down in the outset, only it would seem to be immediately and strangely violated, by numerous restrictions on, and exceptions to, its operation. Without the full and free operation of that rule, in and over the person of every individual in the army, the martial service cannot be well conducted, for it is essentially involved in the unity of military command. Cramped and manacled as it now is, by the laws and regulations together, the army is rendered unfit for that service for which alone it is instituted.

It might, for illustration sake, be readily imagined, as a theoretical history of the matter, that at the moment the fundamental rule was laid down, and the series of military officers proper, by whom it was to be exercised, was enumerated, the martial service was the immediate, and, indeed, only object in view. Afterwards occurred the various staff agents, with their functions, principally what are called the administrative staff. To consider these among the privates of the army, besides the degradation, would be to subject their important functions to the control of very inferior officers. This would not do. On the other hand, to include them, as officers, in the series of army rank, would be

to subject to them, in the measure of their rank, respectively, the martial service of the army. As little would this do. In this dilemma, what remained to be done with them *as a part of the army?* Nothing, but to dispose of them by the intermediate principle of restriction from military authority on the one hand, and exemption from it on the other, within certain artificial limits; and they became officers of rank unassimilated to that of the line. This is an instance of "that middle course, which always leads to ruin." In course of time, it may be further imagined, these gentlemen coveted military rank, and some of them, through legislative ignorance or apathy, got it. But this revived the same difficulty in a new form, which could now only be gotten rid of, by divesting that rank itself, through a course of executive legislation quite familiar to the army, of all military power in their persons, and they became thenceforth, in the phrase of the regulations, "officers with assimilated," or counterfeit, "rank."

But the ambition which sought the rank, would not so readily be deprived of the corresponding functions and privileges. Hence a conflict of claims and pretensions, on both sides of which much law, regulation, and practice, foreign and domestic, are adduced, without the hope of an ultimate adjustment, unless recourse be had to constitutional provisions, and the reason and necessity of the case.

Meanwhile, by way of compromise with these staff officers, for the actual privation of that, to which the law should never have allowed them the slightest claim, nor ever have placed them in a situation to think of it, a qualified military authority is allowed, or rather pre-

tended to be allowed, to part of them, by means of the rule, "that the chiefs of staff will form a chain of subordination among themselves." By way of exemplification of what was not easily to be conceived, it is immediately added, "thus the Colonel" (assimilated) "who occupies that station in a division, will have a direct authority over a Major," (assimilated,) "chief of one of the brigade staffs in the same division; but should, in this example, the Colonel give an order to the Major, incompatible with the duties of the latter towards his brigade, such order would not be obeyed, until communicated to the Brigadier General for his approbation. The same rule will apply equally to any two proximate chiefs of staffs, from the Major General," (assimilated,) "at general head quarters, down to the Adjutant of a regiment." Yes, equally well, certainly. An authority liable to be countermanded by another! a direct authority indirectly exercised! an authority independent of a Major General, yet not so of his dependent Brigadier General! A chain of subordination among themselves, yet linked in with, and interrupted by, the lineal officers, by and in whom a gradual and universal subordination and authority is to take place throughout the army, the whole army, staff and all, "even as one corps!!" This needs no comment, certainly.

Enough, we trust, has been said, though much remains unsaid, to afford a pretty distinct idea of the nature and extent of the difficulties in question.

SECTION II.

Deriving our origin from the British nation, speaking therefore the same language, accustomed so long

as colonies to the same government, whose leading principles are so congenial to public liberty, it was natural, and, perhaps, at the moment of gaining our national independence necessary, that our legal institutions should, for the most part, be moulded on the same forms, and be imbued with the same spirit. However this may be, it is certain that the legal part of our military system bears a striking resemblance to the British, and contains what we regard to be the same radical defect; what this is, we shall now endeavor to show.

The British mutiny act and articles of war constitute an anomaly in legislation, of which, probably, no similar instance can be found. Their co-existence, the sameness of their provisions, and common relation to the same ends, are owing to an accommodation (produced by the reprisals of liberty in process of time on the power of the ancient monarchy,) between the two branches of that Government, which, by a contradiction of terms, are each said to possess the supreme power, namely—the Parliament as omnipotent, with whom the act originates, and the King as sovereign, from whom the articles proceed.

This contradiction in its bearing on the military system is attempted to be reconciled by a gloss of this sort: the mutiny act is represented as being the outline of the military penal law, to be filled up by specifications furnished by the articles of war; the one, as it were, the geographical map, the other the topographical details. The former, it is said, indicates classes of crimes, for the most part by a general phraseology, designating those to which capital punishments may extend; while to the latter it is left to define them with precision, and

prescribe within these limits, the penalties which shall actually attach.

However plausible at first sight this may appear, it requires no great discrimination to perceive that the legislative power of the King, in this matter, effectually supercedes that of Parliament, instead of being controlled by it, as some commentators contend. To declare what acts or omissions shall be deemed offences, what their degrees of aggravation as such, and what particular punishment shall attach to them, thus both furnishing the rules of conduct, and prescribing for their enforcement all the requisite sanctions, is certainly to exercise the legislative power. It would be difficult to define this power, by enumerating any other functions of which it essentially consists; and, as to the limitations of punishments enjoined by the mutiny act, if indeed limitations they can in truth be called, it must be obvious to the slightest examination that the boundaries they afford to the King's prerogative in this concern, are so very wide, that even a despot, though he might covet the power to proclaim the absence of all restraint on his will, could not desire their practical extension. In short, the mutiny act, with its ostentatious annual enactment, is but the ambiguous form in which all this power is acknowledged in the King.

The apologetic and uncandid language of a late military writer, (Samuel,) cannot avail to change this character of the British military penal law; but, on the contrary, strongly though indirectly confirms it. After stating that "so necessary the weight and strength of the royal prerogative has, at all times, been found to the direction and restraint of the conduct of the military body, that it has been always, and is now, fraught with

a concurrent legislative authority for framing obligatory regulations, in certain cases, for the government of the army, independent for a long time, if not now independent, of the other branches of the legislature," he proceeds to say—" the greatest moderation has been discovered by Parliament in the use of its legislative faculty in the affairs of the army; and wherever and whenever it has been exercised, it has evinced a deference to the pre-existing power of the Crown. Its interference, it may be said, has been slow, considerate, and sparing; and it has not at any time had the appearance of a clashing of rival authorities, but a silent sharing with the Crown of a common right for the common benefit; an unostentatious assumption and enjoyment of what lawfully belonged to itself, without molesting or touching the royal interests combined with it. The event has been the supercession, rather than the positive abrogation of the high military prerogative of the Crown in the sole making and declaration of the law, for the higher descriptions of military offences. A result, not of adverse conflict, but of agreement or consent between the parties interested."

Without stopping to comment on the paltering language by which these manifest incongruities are attempted to be dimmed to the reader's observation, we would remark that these delicate and gingerly approaches on the part of Parliament to the Crown have certainly not been attended with the success here attributed to them. Its high military prerogative has not been thus seduced from it by Parliament, and it is apparent, from some of the language of this quotation, that its author was somewhat suspicious, at least, that the pre-existing power of the Crown, so necessary by

its weight and strength to the direction and restraint of the military body, had not in fact been relinquished in any degree to the Parliament, notwithstanding it so lawfully belonged to the latter.

In further confirmation of our views, let us refer to the opinion of Lord Loughboro', given from the bench in the case of Sergeant Grant in Trinity term, 1792, and we think it will be apparent that, while his design in expounding the mutiny act is to show and describe a limitation on the King's power of making articles of war, which we have declared to be co-extensive with the whole power of military government, he actually shows, by the admissions he is obliged to make, that no such limitation exists; but, on the contrary, that there is in fact and of necessity a limitation on the legislative power of Parliament of precisely the character we have imputed.

"The extensive power" says the Judge, "granted by the Legislature to His Majesty, to make articles of war, is limited to the making of articles for the better government of his forces." "Better," that is, we rejoin, than it was thought could be devised by the Legislature, for the remission to him of the power to do so, though called a "grant," is a plain admission of its own inability; "and" continues the Judge, "they can extend to no other cases than such as are thought," by him of course, "necessary for the regularity and due composition of the army."

This regularity of the army is the result of its better government, and this due composition of it is the plan, or due arrangement of the parts, by which such government is administered; and the whole clause, therefore, may be rendered thus, "the articles of war which

the King has power to make can extend to no other cases than he thinks necessary for the government of the army." If this be limitation, what is not so?

It being clear then, to our judgment, that in the British system it is not the King's power to govern or control the army which is limited, we shall proceed to show further, from the Judge's view, that it is the Parliament's power in that respect which, by its own admission, is so. After stating that "breaches of military duty are in many instances strictly defined, in all cases where a capital punishment is to be inflicted," he proceeds to say, "in other instances, when the degree of offence may vary exceedingly, it may be necessary to give discretion with regard to the punishment" to the King of course in his articles. Why, we ask, was it conceived to be necessary to give this discretion?—What is meant by the degree of offence varying so exceedingly in these instances? And why is it that, "in some cases," as he goes on to say, "it is impossible more strictly to mark," define "the crime, than to call it a neglect of discipline?" The one answer to all these questions is this, that that portion of the military control which consists in directing the martial services of the army resides, and must of necessity reside, in the King as commander in chief; and the classes of offences here referred to consist of violations or neglects of his *orders*, and those of his subordinate commanders. As these could not be foreseen, even by him or them, much less by Parliament, it was evidently impossible more strictly to define the crime of violating them, than to call it a neglect of discipline.

The inability thus practically confessed by the Parliament (and conceded by the Judge) to designate and

define these last mentioned offences so obscurely adverted to, may be taken as prima facie evidence that so far it had undertaken a function which cannot, in its nature, belong to it; and surely thus to call in the advice and aid of the Crown, supposed from its martial capacity to be able to afford them, in order through its pretendedly subordinate "articles of war" to enact restraints on its own power, implies at least that sort of defect which attaches to legislating in a circle.

So far then, at least, the power of Parliament is restricted, while that of the King is unrestrained, in the legislative control of the army. But our proposition is even broader than this, and we proceed to support it.

The line of distinction sought to be drawn by Samuel and by the Judge, between the higher description of military offences, and those of a minor sort, as marking the boundary between the legislative powers of the Parliament and the King, will be found on examination altogether illusive, and the attempt to establish it by a clear process of definition, as fruitless as the labors of him who would mark the chord of the rainbow. General and specific, greater and lesser, higher and lower, are terms of significant import enough when applied to subjects on which a regular classification has taken place, but are destitute of clear meaning in all others. Though mutiny itself, from the enormity of which the act to guard against all military offences seems to have derived its name, may perhaps be sufficiently distinguished from all others, yet is it far from maintaining at all times that superlative degree of offensiveness which is apt in idea to attach to it. It is perhaps susceptible of no better or other definition than a resistance of lawful military authority. It may have degrees

of aggravation, rendering it eminently deserving of death, according to the circumstances attending, or the critical conjuncture, of its commitment; but it may also have degrees of palliation which would make policy as well as humanity start back from the application of a penalty destroying life and reputation together. In its lowest degrees it may come so near to its very opposite (lawful resistance of unlawful authority) distinguishable merely by an error of judgment in the delinquent, that it may be doubtful in a moral point of view whether, while he must be punished with death for his unmilitary act, he ought not the rather to be applauded for his patriotic intention. But leaving all this out of view, what constitutes, it would seem, the true distinction between mutiny and all other military offences is, that it is a *resistance* of lawful authority, instead of being merely a disobedience of it.

But by the mutiny act "any *disobedience* of lawful authority" may also be punished with death! Of what then does the minor list of military offences, to which that punishment shall not extend, consist? What that list to which the Parliament not condescending, or not being able, to define, the King is confessed by the mutiny act competent of himself to legislate for? Can there be a military offence which is not in some way or other a disobedience of lawful authority? Certainly not, we think, since all military duty, active or passive, proceeds from such authority expressed in form of law or regulation, or the orders of superiors. What is the result? This, that the Parliament can indeed define by its mutiny act offences to which the penalty of death *may* attach, but consistently with the present vicious military system, cannot define those to which it *may*

not. Is it not a strict corollary then, that the power of Parliament, instead of controlling the King in the government of the army, has only been employed—we speak of the principle, not of the practice—in clearing the way for his unlimited legislation? A few reflections more, embracing other points, will place this beyond a doubt.

As rules of conduct prescribed by the supreme power in a State, the words of the laws belong to their very essence, and the authority, therefore, which shall be admitted to possess the right to change their language or add to it, is that in effect to which the law-making power attaches to the extent at least of such admission. The authority, also, which may interpret a doubtful statute is of necessity co-equal with that from which it emanates; taking the place of the latter in reference to such statute, which accordingly cannot be differently interpreted by it, though it may be replaced by another. The law-making power is legislative, the law-executing power is executive, and the law-judging or construing power is judiciary, by whomsoever exercised. The separate investment of these three departments of power, so far as may be, in different and co-ordinate hands, is most favorable to the liberties of the governed. Their union in the same hands is least so, and when unnecessary may be denounced as despotic.

Now the power admitted to reside in the King of defining the general language of the mutiny act, and the other power confirmed to him by it of designating other acts and omissions as offences is, the former indirect, the latter direct, legislative power; add to these the undoubted and natural power in him of carrying them into execution, together with the power of approving and

disapproving the judgments and sentences of courts martial, (the dependent creatures of his will too,) and you have in him a full union, for most of the purposes affecting the army, of the three powers of government, a state of things which, being despotic in principle, may become so in fact.

It was probably on account of similar views that Sir William Blackstone denounced the military law (so called,) after Sir Matthew Hale, "as in truth and reality no law, but something indulged rather than allowed as a law;" and that he described it as "built on no settled principles, and entirely arbitrary in its decisions." He did not so denounce it, from the opinion that any defect existed in the mode and extent of its publication, as is charged on him by one writer (Tytler) on the subject, nor as Samuel affirms merely because "it defines not the crimes which it designs to punish, nor the punishments which it awards to the crimes, leaving the one and the other too much at the discretion of the Executive, and to the Judges whom it may appoint;" an opinion which undoubtedly he must have entertained; but he so denounced it mainly because those principles of government which guard and perpetuate the liberties of the subject are violated, as just shown, in this department of the law. Hence his lamentation "that the soldiery should be reduced to a state of servitude in the midst of a nation of freemen;" for, in common with Sir Ed. Coke, he esteemed it as one mark of servitude to have the law "concealed," as it is in effect, by vague or indefinite language and uncertain punishments, or "precarious" as it must be, when its declaration, execution, and confirmation are all vested in the hands of one individual,

uncontrolled by any other authority, and whose despotic will in any instance, therefore, may have no better impulse than a heat of passion, or no better guide than deliberate cruelty. The candid and uncompromising language of this eminent commentator is, accordingly, much better adapted to the subject than that of the writer last quoted; and, so far as it goes, impresses the true character of this branch of British law with all requisite distinctness; and thus it is—

"By the mutiny act, among other things, it is enacted that, if any officer or soldier shall excite or join any mutiny, or knowing of it, shall not give notice to the commanding officer; or shall desert, or list in any other regiment, or sleep upon his post, or leave it before he is relieved, or hold correspondence with any rebel or enemy, or strike or use violence to his superior officer, or shall disobey his lawful commands; such offender shall suffer such punishment as a court martial shall inflict, though it extend to death itself. However expedient (he adds) the most strict regulations may be in a time of war, yet in times of peace a little relaxation of military rigor would not, one should hope, be productive of much inconvenience. But our mutiny act makes no such distinction, for any of the faults abovementioned are equally, at all times, punishable with death itself if a court martial shall think proper. This discretionary power of the court is, indeed, to be guided by the directions of the Crown which, with regard to the military offences, has almost an absolute legislative power. His Majesty, says the act, may form articles of war, and constitute courts martial with power to try any crime by such articles, and inflict penalties by sentence or judgment of the same. A vast and most im-

portant trust! An unlimited power to create crimes, and annex to them any punishment not extending to life or limb. These are indeed forbidden to be inflicted except for crimes declared to be so punishable by this act, which crimes we have just enumerated, and among which we may observe that any disobedience of lawful commands is one."

This will be seen to be truly descriptive and confirmatory of the vicious character we have imputed to the British system. Why, then, it may be asked, argue at such length for a truth so clearly stated to your hands, by an authority whose universal acceptance and eminence can impart the stamp of currency to it? We answer, the authority of Sir William Blackstone is, in this instance, disputed by the apologists of the existing system, the truth of his opinion being either directly denied, or else drawn into the shades of doubt by false interpretations upon his language; and this effort is supported, in some measure, by opinions from the Bench, in which the double aspect of the statesman and the judge, are discernible in the simulated exposition of this *organic* law. But why should this be? Is there want of disposition or power in the British Government, in its high minded judiciary especially, to correct what is thus wrong, and bring the military system into harmony with the excellent principles on which the constitution mainly rests? Neither; but we think that the radical defect involved in that system has never been discovered, or not clearly so. The Gorgon knot may have been scanned, but has never been untied. What hinders that we should try? Besides, Sir William Blackstone seems himself to have painfully felt the difficulty we have just alluded to; for his remarks

will be seen to contain an implied admission that, for aught he could perceive, the system must remain substantially such as he represents it; the only mitigation he could hope for, and timidly suggest, being a remission of its severity in times of profound peace. But we shall endeavor to show, before closing our observations, that these revolting features of the system are unnecessary and even injurious to army efficiency whether in peace or war, and call loudly on the guardians of liberty and justice for a radical reform, adapted to the light and spirit of the age. Let us go on.

To the Parliament belongs the power to raise armies and to grant or refuse the means of supplying them with the necessaries of life and service. But these powers in Parliament, which in this point of view is indeed omnipotent, virtually includes that of disbanding and reducing it, and, in short, any other which that body may choose to assume in the matter. It did once assume the power, previously and since resident in the King, of commanding the army, relinquishing it only on its conviction from experience that it was of a nature to be properly exercised only by a single mind. But though it relinquished the actual power to *command*, and with it all its own proper powers to *govern*, it has, nevertheless, continued formally to assert a potential right to control him in both functions. Hence the mutiny act, though it contains many rules of a permanent character, referring to army service, found by experience to be always compatible with the nature of that service, is yet, so far as it pretends to be of controlling efficacy over his martial command, an empty pageant of power replaced, for all practical purposes, by the articles of war, regulations and orders. This

mere assertion of right, on the part of Parliament, and the acquiescence in it on the part of the Crown, so much insisted on by the apologists of the system, are to be rightly regarded in no other light than as an act of mutual simulation, by which the actual state of things is concealed, and the appearance of a divided power given to what actually resides altogether in the King as commander in chief; and in this capacity *only* it is important to remark, for however artificially the King's relation to the army may be described, still is he necessarily, as the executive head of the Government, a component part of it, whether he does now, or shall in future, as in times past, command it in person or not.

That function, always potential in the King, has, when not exercised by him, devolved on his next inferior officer, who is then commander in chief de facto; when death or any other cause shall occur to interrupt its exercise by this last, the function in course further descends; and so on without definite limitation, short of the whole range of officers, and, we add, without any possible qualification or change in its nature or exercise. The power to make articles of war, for example, though according to British doctrine attaching to the *Crown*, has become and continued so attached for what has been deemed an *imperative* reason. It attaches to the King in his capacity of commander in chief or head of the army, as being a necessary and inseparable part of *that* function, not as he is chief of the executive branch of the British Govornment, for then it would naturally and of course be exercised by the Legislature itself.

What the King, as commander in chief, must in the nature of things be to the army at large, such each com-

mander of a separate part of it must also be, for the same reason of necessity to such part, when removed without the sphere of his actual control. If, therefore, the King in that capacity must exercise legislative, executive, and judicial functions in his wide sphere, so also must every such separate commander in his. But actually, this almost absolute power does not universally attach to such separate commanders. That it descends at all would be sufficient to bear out the assertion on British doctrine that it should descend entirely; and that it is actually separated at all from the function of such commanders, is sufficient to prove that it is, so far at least, separable from his power also.

With exceptions, then, artificially and inconsistently created, the authority of military officers in the British system comprises in principle, and partly too in fact, legislative, executive, and judiciary powers, in relation to all the ends, primary and subordinate, of the army institution: that of combat with an enemy, that of good order as a separate and peculiar society, that of discipline and restraint over the licentious conduct of its members, by which the peace and safety of the civil community are jeopardied; that of procuring and supplying, within the limits of parliamentary appropriations, the means of support and service, and so forth; and these various powers, in the instance of the King over all, and of other officers over their respective commands, imply, on the principle that to him of whom an end is required, the means are to be allowed, corresponding obligations of duty and obedience. This again requires a corresponding control over, and arrangement of, all the persons in any way connected with the performance of these functions, and consequently doctrines

of rank and command, applicable to and inclusive of them all, which are artificial and heterogeneous to excess.

In truth, there is but one function, attaching to the King as the head of the army, which requires in him other than the single and common *executive power*, properly so called; and what in this instance is, and must be, absolute power over its subjects, is the strongest argument that can be offered, why the paramount power of Parliament should be most jealously exercised in circumscribing it within the narrowest limits, that may be compatible with the transcendently important end for which he must remain invested with it. In this respect, Parliament may be considered as occupying that narrow isthmus of precaution, between the danger to the liberties of the nation from foreign force on the one hand, against which it is necessary to provide by the investment of dictatorial powers in the commander in chief over the army, and the similar though less imminent danger, on the other, from its own army thus absolutely controlled by its military commanders.

In what attributes and functions this martial command properly consists, will be shown, and the line of demarcation drawn between it, and that government of the army now exercised by the King through his articles of war and orders, which, like any other portion of legislative power, should be exercised by the Parliament. Passing from this general view of the British system, however, to a more particular examination of our own, we shall exhibit that distinction in immediate connexion with the latter.

SECTION III.

Notwithstanding our propensity to copy the British legal systems, and the fact that the National Legislature, in regard to the military establishment, have done so with a fidelity almost servile, the framers of our Government did not fail to detect the anomalous character of the double legislation described, the viciousness of its principle, and the figment by which the identity, in most respects, of the two codes was made, by a sort of political refraction, to assume the appearance of different, tho' assimilated, streams of supreme power. Accordingly, the mutiny act, in its distinctive character as such, was left entirely out of our constitutional military system. Judging, too, from the provisions of the constitution, its framers were very successful in tracing the distinction between those powers which are indispensable to the commander in chief, and those which might, and therefore should be, retained by the civil government; for, while to the President alone is given the power of commanding in chief, that of making "articles of war" was deemed to constitute no part of the function, it being clearly embraced, and so in practice taken to be, in the congressional one of "making rules for the government of the land and naval forces." This particular difference between our own system, and the British, is the more worthy of notice, because that power is virtually confessed by the Parliament to be one which, from its nature, cannot be adequately exercised by the legislative branch. The more correct conception of the matter in our system, as it will ultimately be shown to be, is probably ascribable to the fact that, among the framers of the constitution

were those who united the talents and experience of soldiers to those of statesmen, and who were thereby enabled clearly to distinguish, and rightfully to feel, what was necessary to guard the liberties of the nation from foreign force on the one hand, and the possible perfidy and licentiousness of its own military establishment on the other.

Nevertheless, we have now to remark, that our National *Legislature* have unhappily contrived to place our military establishment on a similar footing, in this respect, with the British. In other words, have based it on the same vicious principle of a double exercise of the supreme power in the control of it, relatively to all the ends, primary and subordinate, of its institution, by Congress and by the President.

This is seen in relation to the primary end "martial service," by the interference of the Legislature in functions strictly belonging, and exclusively so, to the President as commander in chief, of which numerous instances can be selected from the statute book, such as expressly making it lawful for him to employ the troops in the fortifications of the United States; thereby implying that, without such authority, it would not be so: authorizing him to cause certain corps to be employed in the fields, on the frontiers, or in the garrisons, as he shall deem consistent with the public service; thereby implying that the command in chief of the army was in Congress, and could be exercised by the President only in virtue of such delegated authority: expressly enacting that a regiment to be raised should be considered as part of the military establishment; and declaring that, by virtue of the same act, it should be commanded by the President; implying that,

without these provisions, it would neither have formed part of the army, nor have been under his authority as commander in chief. Interfering with the martial or service formation of the army, by enacting that officers with the rank of brigadier general and major general shall command brigades and divisions, subjecting these arrangements to be varied by the President; thereby implying that he had not a full right of himself, as "commander in chief," to make and change these and similar arrangements, though vital to the very exercise of that function; and, furthermore, intimating the existence of a power in Congress to control the very formation of the troops in the field of battle. Exempting certain officers from certain military duties, unless specially ordered by the President; thus interfering with the manner of his command, as exercised by himself personally; arresting, too, the descent of the *entire* function to his subordinate commanders, and thus destroying the unity of the military command. Authorizing his inferior officers to give furloughs to non-commissioned officers and soldiers in such numbers, and for so long a time, as they shall judge to be most consistent with the good of the service; thereby abridging his military command, both as it respects the discretionary function of it, and the persons by and over whom it is to be exercised. Authorizing certain descriptions of officers to take post and command in certain cases; that is to say, as of right, and independently of the President. Empowering his inferior officers to appoint courts martial when, in their judgment, necessary; thereby likewise impairing his command in its essence, and in its operation over them and the members of such courts. Enacting that "a commander of the army of

of the United States" shall be appointed and commissioned by the style of "General of the armies of the United States," these being descriptive of the constitutional and, therefore, unalienable function of the President. His power has, in like manner, been impaired by implication or in fact, and changed and hindered in many other particulars by Congress; of all which acts and doings it may be remarked, to say no more of them here, that they are instances of participation by Congress, in the power of the President, to command in chief.

While Congress have thus by law participated in the power of martial command, impairing its necessary functions, restricting its rightful province, and interfering with the duties and obligations of its officers, who are the exclusive agents of the President for this purpose; he, on the other hand, by affecting the power of making "regulations," has shared with that body in *its* exclusive power of governing and regulating the army. The existing code of regulations is the full proof of this statement, and it bears, in many particulars, the same relation to the articles of war in our system, as the code under this latter name bears to the mutiny act under the British system: changing, extending, or restricting the provisions of the laws, in many instances, by the process of constructive paraphrases; and containing many provisions emanating from the President alone, for the government and regulation of the army collectively, and of all the individuals belonging and attached to it, in all their various functions.

If any proposition within the compass of our political system is susceptible of rigid demonstration, this certainly would seem to be such; that it is not within

the competency of either department of this Government to forego, or delegate to any other, a function confided by the Constitution to itself; yet these very regulations, to say nothing of the other particulars to which we have referred, have been made by the President, promulgated and enforced by him, not only with the connivance, but with the implied and even the express, sanction of Congress, without having passed the ordeal of its own legislative action.

To the American President then, in like manner, tho' not to the same extent, as to the British King, in his independent capacity of commander in chief, has been expressly or virtually conceded, powers of a legislative-executive, and we may add, tho' we have forborne, for a special reason, to give instances of this, a judicial kind, in relation to all the ends of the army institution; and by the American Congress have been assumed, with like impropriety, powers of a martial character belonging exclusively to him; and, therefore, the like consequences, as to the organization, government, and command of the military force, must follow, as we have adverted to in the British system; the same vicious principle being found in both. What wonder, then, that the following confused and contradictory view of the constitutional powers under consideration should have been given.

"The manner of employment of the army," says Mr. Rawle, in his commentary on the Constitution, "may be directed by Congress, or confided to the President; Congress may direct when and where forts shall be built; may also prescribe that they shall be garrisoned either with specific numbers, or with such a number as the President may think proper; so, in times of

peace, troops may be stationed by Congress in particular parts of the United States, having a view either to their health and easy subsistence, or to the security of distant and frontier stations. But during the emergencies of a war, when the defence of the country is cast on the President, and dangers not foreseen may require measures of defence not provided for, the President would certainly be justified in preferring the execution of his constitutional duties to the literal obedience of a law, the original object of which was of less vital importance than that created by the exigencies of the moment; and there can be no doubt that this necessary power would extend to the erecting of new fortresses, and to the abandoning those erected by the order of Congress, as well as to the concentration, division, and other local employment of the troops which, in his judgment, or that of the officers under his command, became expedient from circumstances. This," he adds, "would not be a violation of the rules laid down in the preceding pages, (of his book,) since the obligation of the law is lost in the succession of causes that prevent its operation, and the Constitution itself may be considered as thus superceding it."

Comment on such views might well be deemed superfluous; yet it may not be amiss to remark, that they have evidently been deduced from the vicious legislative practices we have so partially exposed and denounced, and not at all from the letter or spirit of the Constitution itself; and, therefore, the reflections of the reader may be profitably employed in contemplating the poisonous effects, on the fountain of our public liberties, which have thus resulted from the vicious principles of a double exercise of the supreme power

in the control of the army, and which effects time may confirm beyond remedy. By this view it appears,

1. That Congress commands the army as a matter of course, and may, and therefore may *not* confide it to the President!

2. That, nevertheless, in times of war, "when the defence of the country is cast on the President," he may, in opposition to Congress, assume or usurp! his *constitutional* power to command the military forces!

3. That, accordingly, he may judge and decide that the object of a *law*, made for his government, is of less vital importance than such power in himself, and may therefore, of his own will, set it aside and assume the dictation!

4. That, in so doing, he may also undo all that Congress had done, and had and have the right to do, in the building and garrisoning of fortifications, in the abandoning and destroying them, and in the concentration, division, and other local employment of the troops!

5. That these powers devolve, also, upon his subordinate military officers whenever, in their judgment, it becomes expedient to exercise them! And

6. Lastly, and generally, that the obligation of laws, governing the military establishment, may be lost in the succession of causes that prevent their operation; of which, in these cases, the President and his military officers, the very subjects of those laws, are to judge!

The proximate cause of this jumble of powers, equally in our existing system and that of the British Nation, from which we have copied it, is, that what is peculiar and essential to the power of commanding the army in chief, or, rather, commanding it at all, has not

been distinguished from those particulars which are concerned in the government and regulation of it, and which might be in both, and, by our Constitution, we contend are, by its letter and its spirit, required to be separated from it.

That instrument expressly, and even pointedly, provides "that Congress shall have power to make rules for the government and regulation of the land and naval forces;" and, also, "that the President shall be commander in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States." These provisions, taken in the common acceptation of their language, do indeed cover the same ground; for to make rules is to rule, govern, or command; and to command, is to govern, rule, or make rules. But who, for an instant, would suppose that it was the intention either of the framers or adopters of the Constitution to sanction the monstrous policy of a double exercise of the supreme power, in relation to the same ends? What is there in that instrument, formed under such auspices as it was, and admired as it is for its wisdom, analogous to so suicidal a purpose? For the very reason that these expressions, taken in this vague sense, are synonimous, they must not be so taken; but, on the contrary, special acceptations, corresponding to the special, the technical objects in view, must be attached to them. That the Constitution, like any other law, is to be so construed as to avoid absurdity, and give effect to one and all of its provisions, is a principle of right, reason, and common sense, which will find ready admission to every judgment. Yet, strange as is the fact, such it nevertheless is, that it has never been so con-

strued in these particulars. These two powers, from a difficulty or inability in discriminating between them, have been left without definite boundaries; and though it has happened that each has retained a peculiar sphere of operation, resulting from the more obvious features of their distinction, they have reciprocally encroached upon each other's natural province. This is the true cause of those difficulties in rank and command, and of those controversies in respect to them, which have so long agitated the service, and impaired its efficiency and harmony. To this is to be traced that patchwork scheme of organization and government, which the laws and the regulations, or institutes, of the army of necessity exhibit; and to this is to be referred the astounding fact that the Congress of the United States did, in the year 1821, enact, without examination and discussion, an octavo volume of closely printed laws, affecting the liberties and lives of their fellow citizens of the militia and regular land forces, then or thereafter to be in the national service, prepared to their hands by the commander in chief! and, further, that that commander in chief, after Congress had withdrawn the sanction so inconsiderately given, did, in this republican country, publish those same laws, in the words and figures following: "War Department, March 1, 1825, Orders. The following General Regulations for the army, having received the sanction of the President, *he* commands that they be published, for the *government* of all concerned, and that they be strictly observed. Nothing contrary to the tenor of the said *regulations* will be enjoined on any portion of the United States' forces by any commander whatsoever!" Would the monarch on the British throne have dared to exercise such forbidden power?

More, much more, might be advanced, to show the necessity of defining with precision the distinct natures and provinces of the two powers in question; but this will suffice.

SECTION IV.

The power of commanding in chief, in its political aspect, or in its relation to the supreme power of the State, is set forth in the following extract from the able commentaries on the Constitution by Chancellor Kent; speaking of the Executive Department, or President, he says, "the command and application of the public force to execute the laws, maintain peace, and resist foreign invasion, are powers so obviously of an executive nature, and require the exercise of qualities so characteristical of this department, that they have always been exclusively appropriated to it by every well organized Government upon earth. In no instance, perhaps, did the enlightened understanding of Hume discover less acquaintance with the practical science of government, than when he gave the direction of the army and navy, as well as all the other executive powers, to one hundred senators, in his plan of a perfect commonwealth."

Let us briefly review this doctrine. The qualities here referred to, as characteristic of the Executive department, are unity, secresy, enterprise, energy, and dispatch; and these do certainly no less characterize military command. It is, therefore, as apparent that the Executive department, or President, is the proper repository of the power, as it is certain that the Constitution has so disposed of it, in terms of most unequivocal import. But before we admit its being a power

of an "executive nature," we must learn distinctly what is to be understood by this phrase, or by those with which doubtless it is convertible, "executive power" or "executive authority;" for, when the subject of our reflections is in any degree removed from particular things, we necessarily conduct our reasonings through the medium of words, as the signs of our thoughts, as we do with figures and algebraic signs in mathematical investigations. The more abstract the subject matter of our conceptions, the more necessity is there for precision in the signs we employ, both as they affect our own conclusions, and the clear conveyance of them to other minds.

There are, then, two very different senses in which the phrase "executive power" is employed. In the one, it denotes the power to execute the laws; in the other, the power exercised by the Executive department. According to the first, it is said "the natural province of the Executive magistrate is to execute the laws, as it is that of the Legislature to make laws. All his acts, therefore, properly executive, must presuppose the existence of the laws to be executed." Conformably to the latter sense is the view given in the Federalist, of a special power—that of making *treaties*, namely, "though several writers on the subject of government place this power in the class of executive authorities, yet this is evidently an arbitrary disposition. For, if we carefully attend to its operation, it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definitions of either of them. The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for

the regulation of the society; while the execution of the laws, *and* the employment of the common strength, either for this purpose, or for the *common defence*, seem to comprise all the functions of the Executive magistrate."

Supposing these examples sufficiently illustrative of the two senses of the phrase, we might without more ado directly infer that the command in chief is not an executive power in the first, proper, or natural sense; but to give more effect to the inference, we shall connect it in a contrast with that sense, as follows: "The object," says Chancellor Kent, "of this department, is the execution of laws; and good policy requires that it should be organized in the mode best calculated to attain that end with precision and fidelity; when the laws are duly made and promulgated, they only remain to be executed. No discretion is submitted to the executive office." Had he commenced this remark by saying—"the *main* object," then the statement in reference to such object would have been strictly true. But taking it as it stands, we may ask, when was ever a fleet or an army commanded, without so necessary a faculty in its chief as discretion? and when by direction of law? But, possibly it may be replied, that Congress, in its declaration of war, does in fact or effect pass a law, and thereby devolve on the President the duty of carrying it into execution. This is true; but only so far as commanding is *not* concerned; for the argument which should include this power among acts of the President merely and properly executive, that is, in the first sense of the phrase, would be false by proving too much. It would equally prove the legislative and judiciary departments and powers to be also

executive in the same sense, for that power devolves on him expressly and directly from the common legislative master of all three, namely, the People, by virtue of the Constitution itself. It devolves on him, too, disconnectedly from such declaration of war, that is, whenever an army or navy, or a fragment of either, exists; whenever, also, any portion of the militia is called into the national service; whenever a domestic insurrection is to be suppressed; and, in either case, whether in time of peace or war. Now, then, we conclude, with all possible emphasis, that this power is not an executive power in the first or natural sense of the phrase. It follows that it can be a power of an "executive nature" only by reference to the qualities of the department which are essential to the full exercise of it; that is, both in the *direction* and the execution.

It follows, too, that in a despotic Government every power may as well, in this last sense, be included under this phrase. Even in Governments far from despotic, such as the British, though less free than our own, we accordingly find, not only the power under consideration, but those of declaring war, granting letters of marque and reprisal, making rules for the government and regulation of armies and navies in all their relations of service and government, and so forth, enumerated among the executive powers; and we find, in the administration of our own, the imputed strong propensity to imitate British examples, in the full exercise of this last named power by the *President*, in the very face of the Constitution which vests it in *Congress*.

While the President's power of commanding in

chief is executive only in the sense just assigned to it, it would seem that Congress was disposed to make reprisals on it, by way of compensation for the loss of its own power just referred to, by treating it as an executive power in the other sense of the phrase. Of this propensity, having likewise a British example in the mutiny act, we have given instances enough, and it only remains to say, that it will prove in the hands of our Legislature, as in theirs, a barren sceptre. These mutual mistakes, for in fact they are nothing else, do not proceed so much from any inherent ambiguity in the phrase in question, as from a political prejudice which precludes the consideration of its two distinctive senses. To this we will now turn our attention briefly.

In the minds of writers on the subject of government there seems to be an insuperable necessity of moulding all its powers into the tripartite form of legislative, executive, and judicial powers; of grouping them all, however various their nature and essence, under these three, as it were, cabalistic names; as if such powers, for example, as those of appointing to office, preferring impeachments, trying them, forming treaties, commanding the military forces, and so forth, which confessedly cannot be included under the proper definitions of either of those powers, could not be called by some other name. The mischief of this false apprehension is seen, at last, in inconsistent and vicious legislation, generated through confusion of thought; and the reader will have noticed the confused intermixture of the two senses of the phrase, "executive power," in the quotation from the Federalist, even in the very act of giving its essential and natural meaning, or strict definition.

While it is said the essence of the legislative power is to enact laws, the executive, so far from being defined *simply* by the corresponding function of executing them, cannot in the mind of the writer there be described, but by availing himself of a reference, (such is the influence of this propensity,) to the qualities of the Executive department, so as to "comprise all the functions of the executive magistrate."

Though in the natural senses of the terms, all legislative powers be vested by the Constitution in Congress, all executive in the President, and all judicial in the Supreme Court, it does not therefrom follow that all the powers they respectively or jointly exercise must be of one or other of these descriptions. It has been very conclusively shown that these three departments, or branches of Government, cannot be entirely separate from, and be deemed independent of, each other, in regard to the powers they are to exercise; but it by no means results that the powers themselves should be blended, their definitions be lost, and their distinctive nature be overlooked. We may still view them abstractedly from the department which exercises them, and dissociated from all other powers. It is the more important to do so for the reason alleged, that our language and reasoning will participate the confusion with which our conceptions may be clouded. This, accordingly, we propose to do with the power of "commanding in chief."

Of executive power, we have just shown two very distinct sorts, namely, the power of executing the laws, and the other power exercised by the Executive department. We have shown that the power of commanding in chief belongs not to the former, but to the

latter branch. This was shown by a slight reference to the nature of the power and to the language of the Constitution. This opposing prejudice, however, is too strongly fixed to be thus dislodged. It must be eradicated.

The supreme power of a State consists of willing and doing. These two parts are clearly distinguishable in thought. Are they separable in practice? No and yes. They are not separable, because willing without doing is a palpable nullity, and doing without willing is a plain impossibility. They *are* separable, because they are separated in the instance of the legislative and executive powers concerned in the administration of the laws. What is the necessary conclusion from this short argument? That the executive power here *meant* is, unquestionably, subordinate to the legislative, and that the Executive department, in so far as the laws are concerned, is also subordinate to the Legislature. So far we say, for, in other respects, both the executive power and department are co-ordinate with the legislative. It follows, conclusively, that the President, as commander in chief, is independent of legislative control in the *exercise* of that function. We are careful in this language. We do not mean by it that even in that capacity he is entirely independent of the legislative *department*. This distinction is of very significant import, as will be shown hereafter.

The instances given of vicious law, on the one hand, not only show a disregard of the two distinctive senses of executive power, but evince an extremely vague and imperfect apprehension of the *essential nature* of military command; while the instances given, on the other, of invalid regulation, show an equal misconcep-

tion of the true *province* of the power of commanding in chief. This will be our sufficient apology for the following rationale of military command, and general description of martial service.

To produce concert of action in a body of men for any purpose, a common will is necessary, to which all agree to submit. This principle is the foundation of all government. When time, place, and other conditions allow of it, this common will may be the result of the sentiment of the majority, or of the major will, of a previously selected portion, as of the Legislature in a civil Government. But in an army, the common will or authority (to give it another name) for martial service, or contest with an enemy, cannot, from the nature of that service, result in either of these ways, for this reason, among others equally cogent and conclusive, that emergencies would not allow the time to ascertain it. Hence the *necessity* of previously vesting it in some individual, who thus becomes the leader, or "commander." But the authority in him would be almost nugatory, notwithstanding its unlimited sway, and its intrinsic full power, if an arrangement were not made of the numerous persons on whom it is to operate, so as to enable him to reach and address any individual, and any proportion and description of the whole body, in order to control their services in such manner as might, in his judgment, be necessary. This arrangement must consist of a primary distinction of the whole body into two classes; *officers*, in whom, as his agents, he may, at his discretion, repose authority to exercise command subordinate to his own; and *privates*, whose sole duty will consist in obedience of such, either as exercised directly by himself, or through such

officers. The *necessity*, also, of this arrangement is self-evident, for ubiquity alone could enable him to dispense with it.

These officers are in all strictness *his* agents, in relation to this martial service, and must, therefore, derive all their authority in this regard from him alone. They might, also, derive their appointment from him, but this is not necessary; and, in reference to other objects, in view of the supreme power of the State, would be highly inexpedient. The source from whence his own authority is derived, is also competent to furnish him with officers, and they are appointed accordingly by the Government, (under our Constitution,) on his nominations. Their appointments or commissions, however, confer only an *eligibility*, not a right, to command.

There cannot be two wills in an army at the same time, in relation to the same end, any more than there can be such in the same individual. Double authority in the former, like double-mindedness, or insanity, in the latter, would equally produce distraction of purpose and abortive results. Now, as the whole includes all its parts, so the commander in chief of the army *must* be the commander of all who belong to it; and as his power extends to the attainment of the ultimate end for which it is instituted, so *must* all other ends and powers, purposes and duties, be subordinate. These considerations, to say nothing of others, disclose in bold relief the inviolable principle of military unity, and demonstrate that what was declared by the regulations as "the intention of the Government—that there be established throughout the army, as one corps, a gradual and universal subordination or authority" is in

fact the meaning and necessary construction of the Constitution itself.

Such, in relation to the military forces, being the essential nature of the President's special power of commanding in chief, let us next look at the rightful province of its operation.

SECTION V.

The event of war presents many objects for the attainment of which the supreme power of the State is to be exerted. Among these, the raising, supporting, and commanding the military forces of the nation are primarily to be noticed. These forces are armies and navies. The purpose of both is martial service, of the one on the land, the other on the ocean.

Martial service on the land comprises a variety of special operations, which are all, however, comprehended under two heads, namely, the conduct of a campaign and that of a battle, or, in technical phrase, strategy and (by a false epithet) *great* tactics; to which are prerequisite a knowledge of topography and of the *lesser* tactics.

Strategy is defined to be "the science that treats in general of the mode of employing troops in the execution of a campaign; that combines and directs the several operations to determinate objects; that anticipates lines of march and fields of battle. Strategical movements are those upon the great lines of march, which are the foundation of the operations of a campaign considered abstractedly from the manœuvres of the different arms during the action."

Great tactics is defined "the art of managing and combining the various elements of an army, in order

to put it in action against an enemy. It is properly the art of combat and battles. The movements of great tactics are those made during an action, to take advantages of localities and circumstances of the moment."

Topography consists in the knowledge of local circumstances, and is divided into two departments or degrees, corresponding with strategy and great tactics, namely, first, a knowledge of the chief features of a country, such as the general form and charater of its sea-coast, its principal water-courses, its great communications, its chains of mountains, and so forth; and, second, a minute knowledge of particular localites; and may be called general and minute, or the greater and lesser Topography.

Strategy, as a plan, may be considered as comprising the policy of the campaign, based, so far as the ground is concerned, on the general topography of the country. In its movements it is, together with great tactics, the execution of that policy; this last being based, in like manner, on the details of minute topography.

The lesser tactics are described "as a very elementary part of the art of war. They are confined to manœuvres and evolutions, without regard to the ground or to events. They are the instructions which troops ought to have received before they appear in the field to execute the movements of the great tactics."

As martial service at large would be properly defined a contest with the enemy, and would comprehend, accordingly, hostilities on both land and water; so, obviously, its two general kinds, are army and naval operations. Strategy and great tactics, however, are differences, not of kind, but of degree; for the one leads into the other, just as general and minute topography do; and

both relate to the land branch of martial service. They would, therefore, be with more consistency called the great and lesser tactics; and what now passes under this latter name, "discipline," or, in this connexion, "general tactics;" for, in reality, they are the systematic compendium of those principles of army movements, considered in the abstract, which the skill of the commander applies in the battle-field to the events of the moment, and the localities of the ground; and these, in their turn, are based on the constituent parts of an army, or those various descriptions of troops or arms of service, whose faculties of movement, sphere, and manner of service limit alike the operations of great tactics and strategy.

All these arms of service are to be brought to bear on the enemy, either for attack or defence, in such relative proportions, and in such forms of array, as the immediate occasion shall require. These proportions and forms are also to be changed, at any moment, according to the changing character of the object in view, the localities of the field, the plans of the enemy, his successes or reverses; and, in short, the events and circumstances of the battle.

These attacks and defences may take place, not only on the field or open country, but in and about fortresses, on the sea-coast and in the interior, in combat with a naval or with an army force, or both. They may take place with the army alone, or in combination with a naval force; and may require the building and occupation, or the destruction and abandonment, of fortifications.

Nor is this all. To a successful contest with the enemy, it is essential to make distributions and detach-

ments of these forces, of whatever kind and in whatever numbers may be judged proper, to whatever places and distances may be indicated by the nature of the operations as planned by the commander, or as modified by the enemy.

Hence the composition and resolution, the formation and the manœuvring, the distribution and the concentration of the military forces, in an enlarged sense, relatively to the general operations of a campaign, or in a minute or particular sense, relatively to the immediate purposes and incidents of a battle; in other words, according to the principles of strategy and tactics. These, together with all the other operations incidental to them, constitute the martial service; and the control of the military forces in all these respects, and under all these circumstances, is, therefore, the exclusive *province* of the President's power as commander in chief.

The proper objects or ends of civil power are of gradual development, and of a nature, therefore, to be foreseen and deliberately provided for; the objects of martial command, on the contrary, are of sudden and fortuitous presentment, requiring to be met with the greatest promptitude, and with full powers, whether counteractive or promotive. In the civil operations of society, the subordinate executive officers may conveniently, and without disorder, be made directly amenable for the improper exercise of their functions, thro' the courts of law, on the same footing as any other class of citizens. The more limited range and fixed character of their duties, admit of their being defined with precision, so that no discretionary power need be confided to them, or to any superior in the control of them. No general provision need be made for the suc-

cession of one to the station or functions of another; no dangerous emergencies are to be apprehended and provided for by the investment of extraordinary powers. But in the operations of an army, the reverse of all this is true. The civil courts cannot have cognizance of military offences, because of the itinerant character of the army, and because, instead of being violations of standing rules, (so far as the martial service is concerned,) of precise and fixed description, they are generally violations of special orders, founded on passing events, casual and fortuitous. These result from the special power of the commander in chief, as exercised personally by himself, or through his officers; and the amenability must refer primarily to him, as an essential incident of his authority, otherwise the vital principle of military unity would be violated. In short, without stopping to complete the contrast between this and the civil power, which is obvious enough, we remark that the power of martial defence, of which the army is an instrument, must be as active and various, as extensive and efficient, as the danger may be; there must be no lack of means, no want of power, no loss of time. The enemy must be met by an opponent as unencumbered as himself.

The framers of the Constitution evidently saw the military power in this point of view, and regarded it as at once a necessary and a dangerous power to the civil community. To promote its *martial efficiency*, and, at the same time, to guard against *the danger* to be apprehended from it, was, therefore, the problem of liberty to be solved in that bill of delegated rights and powers. To secure the former object, it was perceived that the power of command must be wielded at the

discretion of one mind; to secure the latter, that that discretion should be allowed no latitude beyond the necessities of the case. "Of all the cares or concerns of Government," says the Federalist, "the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand;" and elsewhere, "a standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision. On the smallest scale, it has its inconveniences; on an extensive scale, its consequences may be fatal. On any scale, it is an object of laudable circumspection and precaution."

The obvious nature of the power of military command seems to have been regarded by the framers of the Constitution as sufficient security that it would not be meddled with, or participated in, by more than a single hand. On this branch of the problem, therefore, all that was required to be done, in their judgment, was to vest it specially in the President. Hence the only provision in this respect is, that *he* "shall be the commander in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States."

Had the Constitution, in giving this power to the President, positively enjoined that it should be regarded and treated as an executive power, on the same footing as those which are such in their nature and essence, (which, for argument sake only, can be supposed,) it would have been chargeable with the absurdity of destroying the power in the very act of bestowing it; for then it would have been incompatible with the first stated object of the framers, or rather expositors, of that instrument, the martial efficiency of the army. He

could not thus *command* the army, in the proper sense of the term, nor could it have possessed those attributes of promptitude, energy, enterprise and concert of action, without which, however well organized and governed, in other respects, it would have been a weak and cumbrous machine, totally unfit for the martial purpose for which it was created. These attributes, though possessed by him as the executive department, could not be imparted to the army, because he would not, in those circumstances, be acting for himself, but for and under the legislature which possesses them not. Such an investment in him, indeed, would have been merely nominal, its actual investment would have been in the Legislature. "The use and end of this power consisting in the unity and indivisibility of its nature, the moment it is separated into parts," that is, when the willing or directing is by Congress, and the doing or executing by the President, "its essence is dissipated." The power would, therefore, have been lost by being virtually in the hands of a department which, by its constitution and qualities, is unequal to its management.

Had the Constitution, therefore, forborne to make any *special* disposition of the power, it must have been deemed as attaching to the President, by all rational, aye, by necessary construction, as an indivisible power; for this Department alone possesses the constitution and qualities fitted to its exercise. What would thus have taken place in this state of things, by the objectionable process of construction, does now take place by an express, unequivocal, and substantive provision, the wisdom of which is evinced by a consideration of the intrinsic nature and necessary province of the

power, and confirmed by the experience and talents of the revolution.

This power requires in its possessor that he should hold a special relation to the military establishment—that of being supreme controller of its martial services, and relatively to these, of every member thereof. It involves other than executive elements, so to speak, namely, discretionary and coercive powers, to the full extent of that service; and not merely so, but the right to impart that power with all its faculties to his subordinate commanders, according to his own judgment, and to resume it at his own will.

Both parts of this power, the willing and doing, the directive and executive, being thus united in the President, and possessed by him in the fullest force, may be thought to constitute despotic, or at least supreme, power, as we have declared to be the case with that of the British King. It is, however, to be remarked, first, that this power in the President is limited by the Constitution, and should be so in fact, to the martial service proper, or to those services which bear direct relation to fighting the enemy; whereas the King's power extends to all other purposes within the purview of the military institution; and next, that, though it cannot be intrinsically interfered with, either in regard to the standing preparation and attitude of the power, or its actual exercise, it is potentially controlled, or rather kept under watch and guard, by counter powers in the Legislature, whose operation, going as it were side by side with it, may at any time suspend its exercise by disbanding the army, or punish abuses of it by the process of impeachment. It is, therefore, not despotic.

Nor is it supreme, though it may truly be said to have more of the nature of a supreme power than that of Congress; for this may be checked by the President's negative on the passage of its acts, and may, in particular instances, be annulled by the Judiciary. The reverse is the case of the President's power to command; the duty of obedience, from the exigencies of the moment, taking precedence of all other considerations, that is to say, usually, generally, almost universally, for the exceptions will be found in those circumstances only which infer treason in a perfidious misapplication of the public force. What! it may be said, a power partaking more of the supreme than the legislative has, and yet dependent on the latter for its exercise? Yes, even so; for what is the supreme power? It is the collective power of the community applied to certain ends by the *Government*. If what are called *departments* should each exercise distinct and separate powers, and be independent of each other, then all such powers would be supreme, because the departments would then lose their nature, and become in fact distinct governments, possessing legislative and executive power, including (not judiciary, but) coercive power. Make them dependent on each other, either by a mutual participation in the power for the same end, as in the case of the legislative and executive departments, in the exercise of the municipal power; or make one to exercise an exclusive power only, when and while another shall have created and continued the occasion for it, as in the case of the Judiciary in relation to existing laws, and of the power of the commander in chief over the *existing* military force, and the unity of government, in which its essence con-

sists, is maintained. No power of a department can be either despotic or supreme, but may be indivisible in itself, and, within its defined limits, absolute over the subjects of it, and over the means to its end.

Now, to the British King, in addition to the wide province comprehended in his sphere as commander in chief, belongs the power as Sovereign to declare war, to continue and terminate that state; and the only constitutional check on this military prerogative is the power in the Parliament to raise, and therefore disband, armies and navies, and to grant or refuse the necessary appropriations for their support and service. A little reflection suffices to show that this constitutes a very inefficacious check; for, in the exercise of the powers he does possess, the King can originate and continue the state of war, and the refusal of the Parliament to make the requisite appropriations for prosecuting it must be attended, either by a dissolution of the government, or submission to a foreign yoke. So that, virtually, the King possesses the ability to originate the occasion, and consummate the end, of the military power. In this respect, then, he is the *Government*, and being also unaccountable for its exercise or abuse, he is despotic in relation to it.

On the whole, then, enough we trust has been advanced to make evident the true nature of the power of "commanding in chief," its proper relation to the other powers of the State, and the rightful province of its operation. Having been called, we repeat, an "executive power," it has been treated as if it were naturally and essentially such, that is, subordinate in its exercise to the legislative power; and principles, accordingly, have been asserted and practised on in regard to it, ut-

terly incompatible with its true nature. It can be so denominated only in reference to the qualities of unity, enterprise, promptitude, and so forth, which distinguish the department to which it is, by the express provision of the Constitution, and must from its own essential nature be, fully confided, namely, the President or executive. It is really an indivisible power, and can only be exercised under the direction of one mind, and never in form of law. When delegated by the President, that is to say, when remitted for exercise, to his inferior commanders, it goes in its *entireness*, with all its attributes and constituent elements, and can be limited in their hands only by the extent of the means, and the subordination of the special purposes confided to them. It is absolute, during the times of its activity, over those who are subject to it; but neither despotic nor supreme under our system of Government.

SECTION VI.

Having thus, clearly, as we think, placed in its true point of view the nature and operation of the President's power of "commanding in chief," it becomes our next purpose to consider, in like manner, the nature and operation of that other power, residing in Congress, with which it has been, in no inconsiderable measure, confounded in practice, namely, "to make rules for the government and regulation of the army."

It may be thought, however, that after so much pains have been bestowed in developing the former, there can remain no sufficient reason for devoting a like degree of attention to the latter. To this we reply, that, from the relation these powers bear to each other, and still more from that of the departments to which they

severally belong, there will always be a tendency, in time of war, to extend unduly the martial power; and in time of peace, its antagonist, (as we may deem it,) the power of military legislation; and that full security against both evils, judging from the past, is only to be found in a full delineation and jealous maintenance of both powers. The embankment, to separate these waters, should be guarded against abrasion on both sides. We have, however, a much stronger and more practical reason, for our proceeding, which will disclose itself in its proper place.

In the institution of government, it is obvious that each individual of the community makes a sacrifice of part of his natural liberty of action, in order thereby to enjoy the security in society which he must else forego. The more immediate object, or common province, of the supreme civil power, therefore, is not to give impulse and direction to the action of individuals, but to *restrain* them within those bounds which conduce to the common interest and welfare. For the most part, no positive duties are imposed on the citizen, but merely negative ones. He is left to pursue his own interest and happiness, and only limited in his conduct, so that he shall not interfere with or impair the same liberty in others. Accordingly, the Government does not usually sanction its laws by rewards, but by *punishments*.

There is one striking exception to this view, and that is, when the common interest and welfare become endangered in a state of war, and require for their protection the physical power of the community. Here the supreme power is exerted in inducing and coercing individuals to fulfil, each, his part of the common com-

pact in a military capacity. It now imposes positive duties, as well as negative ones; in other words, the Government now *directs* individual conduct as well as restrains it, and sanctions its laws accordingly by *rewards* for conforming to them, as well as by punishments for their violation.

Military control, in the broadest sense of the phrase, differs therefore from the ordinary or civil control, or government, in comprising another *element* of power, and another *sanction*. So far as the directive and restraining power is separable from the hands that must execute it, it is the natural and proper function of the legislative department; but so far as it is necessarily associated with that execution, it must be remitted to the executive department. This latter, as already shown, constitutes the power of commanding in chief. It is at all times to be regarded as a dangerous power to the civil government and community, and is therefore "an object of laudable circumspection and precaution." All other power of military control, comprising every thing else in its wide range, is the "government and regulation" of the military forces. This is vested exclusively in the Legislature; the President, together with his lineal officers, being in relation to it merely the executive department in the natural and subordinate sense of the term. It is so vested, most especially in furtherance of the second object of the framers of the Constitution, namely, *to secure the liberties of the community from military perfidy and licentiousness.*

That instrument, as the general and fundamental law of the land, designates the most general ends in view of it, and prescribes the forms in which the supreme

power for their attainment shall be employed. It also designates the special ends, and prescribes the more particular forms in which the corresponding special powers shall be vested and exercised. This cautious policy is pursued as far as consists with the nature of those ends, and a wise provision for events and interests, as they shall arise out of the actual condition and circumstances of the community.

Among the general ends set forth in the Constitution is that of providing for the common defence. But this is not left entirely to legislative discretion, for the subordinate ends are enumerated and variously invested. Accordingly, while the power of "commanding in chief" is vested in the President, that of declaring war, that of granting letters of marque and reprisal, that of making rules concerning captures on land or water, that of raising and supporting armies, that of maintaining and providing a navy, that of providing for calling forth the militia, and that of "*making rules for the government and regulation of the land and naval forces*," are vested legislatively in Congress, which accordingly may by law direct the manner and means for the attainment of all these ends.

This last quoted power is that to which our attention is now to be especially given. If judiciously exercised, and faithfully carried into effect, it secures of itself the civil government and community from the dangers to be apprehended from the military forces.

Let us glance at the peculiarity of the language by which this power in Congress is expressed, as preliminary to considering the objects in view of it, and the proper means of ensuring their complete attainment.

Government and regulation are terms whose distinc-

tive imports have been nearly lost, or greatly obscured, by the carelessness of usage. That in the minds of the framers of the Constitution, however, they were apprehended to have severally a degree of appropriate meaning, so that common acceptation would conceive a shade of difference between them, is fairly to be inferred from the use of both terms in an instrument where tautology is something worse than bad taste. But this shade was not a distinct color; this difference of degree was not one of kind; and hence to cover the whole intended province of the power, it was deemed necessary to employ the terms in a cumulative way, leaving to the judgment of the department which was to exercise the power, the mode also of adapting the terms. Accordingly, the government and regulation will be found just equivalent to the restraint and direction of the army, to the good order and discipline of it, or to the single word "government," in the enlarged sense, explained, in which it expresses the *peculiar* control of the military community.

As a separate or distinct community, the army, like any other, requires a government over it to establish justice, and promote the welfare of its members. Considered *merely* in this point of view, it would be only a part of the general community, and as such might be governed under the broad law of the land. But on account of the relation it bears to a special purpose, and of its itinerant character growing out of that relation, such laws must be so modified, in application to it, and to the individuals composing it, as not only not to interfere with the sure attainment of that purpose, but to assist in its efficient prosecution. As thus both distinct and peculiar, it will be seen to hold a twofold relation

to the supreme power of the State. First, as good citizens, its members are bound to observe those rules which Congress may establish for the protection of the civil community and government from a perfidious employment of the military force against the liberties of the country, and from the licentious conduct of individuals of the army. Second, as good soldiers, being bound to render martial service to the State, under the command of the President, its members are to observe those rules of discipline and of good order, which Congress may deem necessary, as the previous means of insuring efficiency to that service, and which, at the same time, are promotive of their own welfare.

This we conceive to be the proper province of the power in Congress, to "make rules for the government and regulation" of the army; and it is, accordingly, to these two ends that the expositors of the Constitution make special reference, and that our articles of war, also, which (like those of the British King) bear a close resemblance to the mutiny act, are confined. The design of that *act* is thus expounded in the solemn form of a judicial decision in the case before referred to.

"By the wisdom and providence of Parliament," says the Judge, "an army is established in this country, which it is necessary to keep up, the establishment being fixed by authority of the Legislature. It is an indispensible requisite of the establishment of an army that there should be *order* and *discipline* kept up in that army. This has induced the absolute necessity of a mutiny act accompanying the army. It is one object of that act to *provide for the army*; but there is a much greater cause for the existence of a mutiny act, and that is, *the preservation of the peace and safety of*

the kingdom, for there is nothing so dangerous to the civil establishment of a State, as a licentious and undisciplined army."

The "order and discipline" here spoken of are indispensibly requisite to an army, because they are the essential means of promoting the welfare of its members, and its martial efficiency. They are scarcely less requisite for the civil community, as the means of preserving its peace and safety. These are obvious propositions. It is therefore as plain that it is the first of these effects which is in the contemplation of the first stated object of the act "to provide for the army," as it is clear, from the coincidence of the language itself, that the other effect constitutes, in like manner, the other object of the act. Order and discipline, then, the common means to these two ends, is but another expression for the *government* of an army, comprising, as before stated, that additional element (of direction) and that additional sanction (of reward) which distinguishes legislation, in regard to it, from the ordinary or civil.

On the rules necessary for the "welfare" of the members of the army, we have already made the only requisite remark; on those for the "efficiency" of the army, as a body, we would observe that they are such as have relation to the personal preparation of its members for rendering good service against the enemy, comprising their accountability for the material means, of every description, placed in their hands, the appointment of drills, roll calls, musters, inspections, returns, reports, and so forth, which it would be out of place here tediously to specify.

As to the other object or branch of this power, it may be remarked that, in so far as the preservation of the

peace and safety of the civil government and community are concerned, the *duty* of the civil authority to restrain the conduct of the army is of such transcendent importance as to awaken special wonder that it should fail to have secured from the legislative branch that pointed attention, and jealous care, which its peculiar character so imperatively demands. The legislative power, for this purpose, is not only of the highest order, but of the broadest character. Intended to be used for the "common defence," not only against foreign armies, but its own, and not only in the defence of the liberties of the country, but of its peace and safety against military disorders, Congress is, by the provisions of the Constitution, as unlimited in its means to these ends, as it is free in its thoughts to devise and apply them. Referring, then, to the existing features of our military organization, and to the source of its existing regulations, let us ask, is it to be supposed that this vital interest of the nation was to be left, for a moment, in the guardianship of the very persons from whom alone it was considered to be endangered? Is that to be regarded as evincing, on the part of the Legislature, "a laudable circumspection and precaution" in guarding the liberties of the State from military perfidy and licentiousness, which consists in a mere *promulgation* of law, without retaining in the hands of the civil authority, the means of enforcing it? which, in fact, relinquishes those means into the hands of those it was designed to govern? Certainly not. Then it follows that these means, and the powers over them, should be resumed and exercised by the civil government. What they are, and how this power should be exercised, remains to be shown.

SECTION VII.

So habituated are our ideas to the existing system of military affairs, so prone are we to the imitation of foreign nations in this particular, without taking the trouble, or feeling the obligation, to consider the difference between their political systems and our own, that any innovation must be expected to be repelled by incredulity and prejudice. Yet, we have one to propose, of no inconsiderable magnitude and importance, and to its consideration, therefore, must invoke all the aids of candour and common sense.

By the existing system the agents, by whom the duty of procuring and delivering, or *providing*, supplies for the army is performed, are called "the administrative staff," and regarded as constituting an integral part of it. Most of them, also, are invested with military rank; yet so that, while they are, on the one hand, prohibited the exercise of martial command, the only legitimate purpose for which *such* rank can ever be given; they are, on the other, exempted from obedience to those holding a degree of that rank inferior to their own, as the necessary effect of its essential nature already explained. Thus they are, most obviously, an extraneous element, in the midst of that otherwise uniform and universal authority and subordination, which is the very definition of military unity, and the basis of martial efficiency; an element which, by no possibility, can be made to assimilate with the institution; and which, as shown in our introductory remarks, is the cause of those confused doctrines of rank and command, out of which difficulties of no inconsiderable importance to its well-being and efficiency do and

must arise. These staff agents cannot be considered army "officers" on the same footing with others, without being drawn away from their proper duties, which are vital to the existence and service of the army. On the other hand, they cannot be deemed "privates," without at once degrading them in a personal sense, and subjecting their functions to the control of any officer however inferior. The footing of all army officers must be one and the same, and that is seen in their full subjection to that universal rule of authority and subordination with which these staff agents, despite of all the ingenious contrivances of assimilated and non-assimilated rank, and of chains of subordination among themselves, and so forth, cannot be brought into accordance, cannot be brought, as we may say, "into line." If, then, they be in fact neither officers nor privates, how, in the name of all that is called common sense and reason, can they be *members* of the army? But prejudice can hold its ground against even these principles. Let us, therefore, take another view of the subject.

If these staff duties can be *as well* performed without such membership and rank, then it cannot be doubted that, by divesting them of both, the harmony and efficiency of the army would be promoted. If, by withdrawing such membership and rank, great additional *security* would be given to the safety and peace of the civil government and community, then it must be confessed, at least, desirable and expedient. And, finally, if the affirmative of both these propositions be shown in the nature of things, and it be further shown that the letter and the spirit of the Constitution demand both these changes in the existing organization of the

army, then will it become the imperative duty of Congress to make them.

In considering these propositions, let us examine the nature and design of that body of agents called the administrative staff of the army.

Were we to imagine what is called the line of the army alone, that is to say, only the combatting portion of it, in the field, no matter by what cause it happened to be thus stripped of its staff, it would, *for the moment*, be able to render the service for which it was created, namely, to fight the enemy. Let us further suppose it to have just rendered such service in a single battle, what then occurs? The wounded must be taken care of, the damage and loss its material means have sustained must be repaired, it must be fed, clothed, and in all respects be again put in condition to remain in the field, and renew its martial service.

We may conceive two ways only of doing all this. First, the commander being put into possession of the pecuniary means, may hire surgeons, &c., purchase all the various supplies, and distribute and store them, according to the wants of the service. But all this would demand much of his time and attention, and involve immense labor and various skill and judgment in matters perfectly foreign to his immediate and peculiar function. For these reasons, he must be assisted by agents. These, in the circumstances we are supposing, must consist of his subordinate officers, who would thus, too, be drawn away from their proper duties; all which would be to the manifest impediment and jeopardy of the primary service of the army.

The other, much better, and in truth the only practicable mode, would consist in the appointment, by the

Government, of a distinct class of agents to do these duties; leaving the commander, with his officers and men, to the undisturbed performance of their peculiar duties. These, then, would be what are called, significantly too, "administrative staff."

Without going into the examination of the staff at large, some classes of which we reserve for separate consideration, we suppose enough has been said of this portion to give an adequate conception of its nature and design. From this general view alone, it is apparent, that these staff agents, from the very reason of their appointment, so far from being constituent members of the army, are emphatically the reverse. That their functions are necessary to the well-being, and even to the existence of the army, is very true; but this is no criterion of membership; for, on this principle, the civil government itself, who gave to the staff its being, who provide for the performance of these duties by appropriating the means, and who do, or rather should, control these very functions, would also have membership, which is absurd. Membership must be determined, (not by the indirect, but) by the *direct* relation of (not professional, but) *personal* service; not to any subordinate, but to the *primary* end in view of the institution, namely, its martial service; and this principle divests all these administrative staff agents of pretension to such membership. They are to supply to the army the materials and means of *its* support and *its* service; to occupy the intermediate place between Congress, the purse-holder of the nation, and the army, to be supported and provided for, from it. With the money appropriated by Congress, they are to feed the army, to clothe it, to arm and equip it, to provide fortifications

in aid of its martial service, and medical and surgical attention for its sick and wounded ; to pay its members their stipulated wages, and to distribute and store, at convenient places for use, its provisions and other munitions; and to carry them about, wherever the army moves, in such quantities as may be required. These, in brief, are the duties of the administrative staff. They are rendered *for* the civil government on the one hand, and *to* the army on the other. The performers, therefore, are the common agents of both. The services of the larger portion of the staff agents are rendered quite *apart* from the army, insomuch that they may never see it. What can be plainer, then, than the fact that these are not members of the army in any just sense of the term? The principle which should comprehend them as such would include, in its wide sweep, every agent of theirs whose services bore the remotest relation to the support or assistance of the army, embracing almost every mechanical profession, every age, and both sexes; and, although the rest of the staff are strongly distinguished by serving more or less in personal connexion with the army, yet the services they render do not bear *direct* relation to the martial service. It is this circumstance alone, we repeat, that characterises a member of the army, because it is this alone that brings him under the power of the President in his special capacity of "commander in chief." One may be under his orders, and those of his inferior officers, yet not be such; for Congress is the efficient authority over the military force itself, and over all connected with it, for every *other* purpose than its martial service. The President, therefore, is not commander in chief, properly speaking, over the administrative staff. He can

control them only according *to law*, in his common executive capacity, that is, subordinately to the legislative department.

Such being the nature of the duties of the administrative staff, and such the contradistinction between their performers and the "combatants" of the army, it is manifest that the titles of military rank, devised for the sole purpose of marking the relative martial authority of the latter, are bestowed superfluously, absurdly, and mischievously, on staff officers. Since, too, their membership cannot be made compatible with the fundamental rule of martial service, and in them such rank is, and must be, without the corresponding functions, they must be considered, in the least unfavorable point of view, as only *nominal*. The question, then, whether the duties can be as well performed without such membership and rank, is reduced to one about the magical effect of a NAME; and this we shall venture to pass over undiscussed.

The next proposition is, that such separation of the administrative staff would give great additional security to the safety and peace of the civil government and community, against the perfidy and licentiousness of the military force.

In what does the security, under the existing system, consist? Apparently in the power to disband the army, and in the power to withhold the annual or biennial appropriations for its support. Are not these, it may be asked, efficacious? We answer, it must be recollected that an army is *necessary*, as well as dangerous. To disband it, therefore, in order to guard against its perfidy, may be only to expose the country to foreign aggression; to *change* the danger, not re-

move it. The power to make appropriations for its support is, in fact, the truly efficacious power for this purpose. But the existing organization of the army, including the administrative staff as *constituent members*, renders it null and void; for thus are they, with their money and means, placed under the control of the President in his special capacity of commander in chief, and consequently under the like control of his subordinate commanders. Thus exercised, the power to support, so far from being a means of checking the misconduct of the army, or arresting its perfidious designs, actually operates to suspend even the power to disband it, by giving to it a temporary independence of the civil power, so long as the appropriations may last. It is, too, a palpable violation of the principle of liberty, which enjoins the separation of the purse and the sword. In the existing system, then, in consequence of this vicious membership of the administrative staff with the army, there is really no security whatever to the civil liberty of the country !! By withdrawing that membership, therefore, and taking these staff agents and their functions under the control of the civil authority, it is perfectly clear, without further remark, that this great evil will be removed, and an adequate sanction be held by Congress for its laws, or "rules," for the government and regulation of the army. Is it necessary to insist that this is both desirable and expedient?

According to our third and last proposition, is it not the imperative duty of Congress to make these changes in the existing military organization? The LETTER of the Constitution requires, as we have seen, that the President shall *command*, and that Congress shall *govern*, the military forces. As the army shall be constituted

or created by Congress, *such* must he receive it as the subject of his power of command. But constituted as it now is, the power of government is not only lost to Congress, but relinquished by it to the very persons it was intended to restrain!! What is the SPIRIT of the Constitution? It is, in the language of its most distinguished expositors, "a cautious and circumspect spirit;" it regards a standing force as a dangerous, at the same time that it may be a necessary provision; that, "on an extensive scale," such as it must be in a time of war, "its consequences may be fatal" to the public liberties. Accordingly, not one power, of a legislative or discretionary character, for the "common defence," that is separable from the hands of the chief magistrate, by or under whom that danger was to be apprehended, but *was* so separated, and expressly intended to be employed under the guidance of Congress. It is, then, the imperative duty of Congress to resume all the powers of military government and regulation.

Bringing, now, into view those departments of the staff which we reserved for separate consideration, we have to observe, that we have done so, not only because, with a partial exception, they are strongly distinguished from the preceding, but because the characteristic mark of that distinction is none other than the direct relation of their personal functions to the martial service confided to the army; which, therefore, identifies them with it, makes them members of it in the proper sense of the term, places them under the control of the commander in chief as such, and should consequently divest them of the name of staff, at least in the sense which applies to all the rest. These are the adjutants', the inspectors', and, partially, the engineers' departments.

The adjutant's department has been characterized as the "mouth-piece" of the commanding officer, and with much force and propriety ; for, whether the example be that of the Secretary of War, in his military relation to the President, or that of a regimental adjutant to his colonel, he is the assistant of his commander in promulgating his orders, keeping his records as to the state of the army, making his returns and statements to superior authority, and so forth.

In like manner, the inspector's department may be called the eye-glass of the commander ; his duty being to inspect the condition of the army, and thus collect and furnish all necessary information to him.

These duties are of a nature to be performed in the field of action, and are only an extension, as it were, of the commanders' own personal faculties of command. They are, then, martial duties, inasmuch as those of the commander himself are so, tho' not of the same dignity. For their performance, which is constant and unremitting, they require military knowledge of the same description which qualifies officers of the line, and agents set apart from other martial duties. But they may, with great propriety, be deemed to come within the class of duties done by "special detail or assignment," so as to afford to the commander, whose responsibility includes theirs, his choice of such agents among the officers of his command. The other description of *duties*, not to speak directly of the department performing them, which (partially) identifies its performers with the army, comprises those of engineering. Of these, it is common to recognise three sorts.

The first is topographical engineering. From the nature of land warfare, based as it is on general and

minute topography, it will be exceedingly obvious to reflection, that the branch of engineering, (so it is called, with no great propriety of language, however,) which consists in *acquiring* this sort of knowledge, is but a part of the duty of every commander, since as such he is to *apply* it in the field. Without it, he cannot be fitted to discharge his duty in what is confessedly his proper sphere. The officer who, on any occasion, performs this topographical duty, is but the personal aid or assistant of his commander, and stands related to him in the same military way that the adjutant or the inspector does. The duty should, therefore, be regarded as martial, and performed in like manner by an officer of the line, as occasion may require.

The second kind is field engineering. This consists in erecting temporary forts, batteries, redoubts, and so forth, according to the occasional wants and emergencies of an army in the field. To say that this function does not fall under, or form part of, that of the commander himself, is to imply that he does not command ; and he certainly is not qualified for such a station, who cannot judge when and where such structures are wanted, what purposes they should be contrived to answer, of what magnitude, form, and character they should be made ; and who cannot both plan and construct them with the aid of the troops by whom the manual labor must, in such circumstances, always be performed. If, by some mental distillation, we could drive from the head of the most perfect soldier the qualifications necessary to the performance of this branch of the art of war, the residuum would scarce pass current for a military mind, or bear the weight of a very humble commission in the service. The commander must himself

judge and decide upon all these points most evidently. It has been well observed of field works, that they are but a modification of the natural or topographical features of a field of battle; and, therefore, what has been advanced concerning the first branch of engineering, applies equally to this.

The third and last branch is called permanent engineering. It is not entitled to be classed among *army* services at all; nor its performers, of course, among army members. It consists in constructing those solid and permanent works, for the defence of a country, which are generally, universally we may say, performed in time of *peace*; works, in which the highest art of engineering, not soldiering, is put in requisition. The spots selected for these structures, together with their plan, extent, and character, and the conditions they are to fulfil, are all determined, not by the President in any capacity, but by the *legislative* department of the Government. In like manner, with all other technical matters in legislation, these points are determined, to be sure, under professional advisement, that is to say, both army and naval, especially the latter, when, as with us is always the case, sea-coast defence is in contemplation; but never at all under military, much less martial, control. The determination of the Legislature on such subjects is expressed of course, too, in its own appropriate form of LAW, which furnishes the rule of conduct in this matter; and the President may not contravene its provisions, or exercise any other than *executive* discretion in applying the law to its end. It follows, therefore, with obvious truth, that the agents of this branch of public service are *civil*, not military men. Their services do not bear

direct relation to martial service, but to building forts, which are only *means* to that end, as shoes are to walking The forts might be destroyed and the army continue, or the army be disbanded, and both forts and engineers remain. They could not be deemed members of the army, on any principle which would not equally include the workmen whose labors they superintend!

Navigation—casual repairs to ships *at sea*—and the art of ship building—in the other branch of military service, bear a very close analogy to these three dedepartments of engineering. The art, exercised by the naval *officer*, of traversing the ocean in despite of the impediments of adverse winds and currents, rocks, shoals, straits, and so forth, implies a knowledge of much the same relative cast with topography. The repairs and the expedients, which the battle and the storm so pressingly demand, of his mechanical and nautical skill, may be considered analogous to the labors of field fortification; while t e naval *architect* and the engineer of permanent fortifications, fail in their analogy, perfect as far as it goes, only when the latter, having exhausted all the points of his art in the comparison, finds it far surpassed in its immediate military importance; for, without the service of the naval architect, involving a complication of skill quite equal to that of the land engineer, no navy could exist; the sailor, without a ship being no longer such. But army services are seldom rendered in connexion with forts, which, after all, are rather *substitutes* for an army than means of its service; yet, strange as is the fact, the naval engineer, with his all-important function, never dreams of pretensions to naval rank of any sort, while the builder of forts is not only vested with military

rank, but absurdly considered as employed "in the most elevated branches of the art of *war !!*"

Nor is this all. They claim, nominally at least, a martial function, distinguishing their rank from that held by all other agents of the administrative staff, namely, the command of troops engaged in sapping and mining, and even the general conduct of the attack and defence of fortified places. Can any thing be more inconsistent with the *civil* nature of their proper duties? What would be thought of the like pretensions of the naval architect? Surely conducting the attack and defence of fortified places is nothing more nor less than the *command of the army* engaged in that service; and this, too, while they must be regarded as under the exclusive control of the civil authority! As well might the mason, who has built your storehouse, claim a partnership in your business, and no more absurd in you to admit his pretensions. Besides, if this branch of martial service be allowed to them, it is demonstrable, from what has been advanced, that the President only is competent to allow it, and then it must be at the expense of their engineer duties, which, being *civil*, it is not competent in Congress to place under his control in his *martial* capacity.

The innovation in the existing system, to which our remarks have tended, contemplates, it should be especially noted and remembered, ☞*no change whatever in the duties of the staff as now performed.*☜ It merely proposes to divest them of a mischievous rank and membership. What objection, then, can possibly be made? No substantial one, certainly.

While this change in the existing system is so em-

phatically demanded by important considerations, affecting the harmony and efficiency of the army, and the safety of the civil state, from its perfidious and licentious conduct, it has one further recommendation of a very striking character, not yet adverted to. By thus withdrawing the staff from all proper membership with the regular army, that portion, whose duties are performed apart from it, may become a "NATIONAL STAFF," applicable alike to every sort of military land force in the service of the United States; and thus a desideratum, at once political and military, of the first magnitude, often suggested and pondered without effect, be supplied; and surely that is such, which seeks to connect the action of the Government of the Union with the supply and support of the militia forces on whom the main reliance must be placed.

The power "to provide for the common defence" is, at all times, in peace as well as in war, one of transcendent and vital importance. Expressly confided to Congress, that body can never, without a criminal neglect of its duty, lose sight of it. It is but a part of that power "to raise and support armies," whether regular or militia. This may, at the discretion of Congress, be forborne; but the possession and preservation of the permanent material of war must be attended to, for to this, time and unremitting care are indispensible. The sudden occurrence of hostilities, to say nothing about "suppressing insurrections," may otherwise find the public liberties and welfare in an indefensible state. Much more, of course, might be said on these topics, but we leave them to the reflections of the reader; merely adding that, if the staff be continued as a part of the army, it will be necessary for Congress to maintain such army

for the sake of the staff; or, by disbanding it, lose the necessary means of supplying the militia, and neglect its high duties of guarding the civil state against military disorders, and making the requisite provision for the "common defence."

ERRATA.

Page 27, for *Gorgon*, read "Gordian."
33, near the bottom, read "field," in place of *fields*.
37, last line, read "principle," in place of *principles*.
48, insert "authority" after the word *such*, in last line but one.
63, 18th liue from bottom, read "integrant," in place of *integral*.

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